

Utility Poles, Comparative Liability, & Subrogation in Automobile Claims

William F. Lyons Jr., P.E., Esq.

President & CEO

Fort Hill Companies LLC and Integritas LLC



National Association of Subrogation Professionals

Overview of Utility Poles in Automobile Subrogation

Survey of Jurisprudence in Modern Case Law

Review of Differences in Comparative Fault Law.

Every state employs one of four basic systems for allocating fault and damages:

1. Pure Contributory Negligence Rule/Defense
2. Pure Comparative Fault System
3. Modified Comparative Fault System (50% and 51% Rules)
4. Slight/Gross Negligence Comparative Fault System.

Source: Matthiesen, Wickert, & Lehrer, S.C., 12/15/2015

Survey of Jurisprudence in Modern Case Law

- Jurisdictions that do not follow majority comparative fault liability
 - AL, DC, MD, NC, VA (Pure Contributory Negligence)
 - SD (Slight/Gross Comparative)

Survey of Jurisprudence in Modern Case Law

- Jurisdictions that follow pure comparative fault liability
 - AK, AZ, CA, FL, KY, LA, MS, MO, NM, NY, RI, WA

Survey of Jurisprudence in Modern Case Law

- Jurisdictions that follow modified comparative fault liability – 50% Bar
 - AR, CO, GA, ID, KS, ME, NE, ND, TN, UT, WV

Survey of Jurisprudence in Modern Case Law

- Jurisdictions that follow modified comparative fault liability – 51% Bar
 - CT, DE, HI, IL, IN, IA, MA, MI, MN, MT, NV, NH, NJ, OH, OK, OR, PA, SC, TX, VT, WI, WY

Design and Engineering Standards Applicable to Utility Pole Placement

Design & Engineering Standards Applicable to Utility Pole Placement

- Why Utility Pole Placement Matters
 - Clear Zone Concepts
 - Application of the Clear Zone
 - Local and State Permitting Issues

Clear Zone Concepts

Clear Zone Defined

“unobstructed, traversable roadside area that allows a driver to stop safely, or regain control of a vehicle that has left the roadway.”

FHWA Safety Program website, http://safety.fhwa.dot.gov/roadway_dept/clear_zones/

Clear Zone Concepts

Clear Zone Standards

- AASHTO guidelines specify the need for a clear zone “beyond the edge of the traveled way, available for safe use by errant vehicles.”
- Vertical obstructions should not be located within the clear zone.
- The width of the clear zone depends on traffic volume, design speed and roadway geometry.
- The minimum recommended clear zone is seven (7) feet.
- Roads with higher volumes and faster design speeds should feature wider clear zones.
- Slopes and curves also influence the size of the clear zone. For horizontal curves the clear zone can be increased by up to 50 percent.

Roadside Design Guide, 3-1 The Clear Zone Concept, AASHTO, 2011

Clear Zone Concepts

Clear Zone Standards

- AASHTO recognizes that in urban environments right-of-ways are often constricted such that providing a full clear zone may not be practical.
- AASHTO recommends that in urban environments there should still be an offset of at least 4 feet, with at least 6 feet on the outer side of a curve.
- “known utility pole hazardous locations should be avoided” and poles should be as far as possible from travel lanes.

Roadside Design Guide, Chapter 10 Roadside Safety in Urban or Restricted Environments, AASHTO, 2011

Clear Zone Concepts

Clear Zone Standards

- Horizontal Clearance – according to the AASHTO Green Book, minimum 18 inch clearance to objects behind curbs is a minimum standard offset that allows for normal traffic operations..
- It is recognized that providing a clear zone as recommended in the Roadside Design Guide may not be practical in low speed curbed facilities because of right-of-way constraints and other realities of the built environment and a design exception is not required in these cases. However, the minimum 18 inch horizontal clearance to vertical obstructions must be met unless a design exception is approved.

AASHTO, A Policy on Geometric Design of Highways and Streets, 2004 (The “Green Book”)

Clear Zone Concepts

Clear Zone Standards

- Recommended clear zone ranges are based on a width of 30 to 32 feet of flat, level terrain adjacent to a straight section of a 60 mph highway with an average daily traffic of 6000 vehicles.
- For steeper slopes on a 70 mph roadway the clear zones range increases to 38 to 46 feet.
- On a low speed, low volume roadway the clear zone range drops to 7 to 10 feet.

Clear Zone Concepts

Clear Zone Standards

- AASHTO Green Book – recommends a 10-foot minimum clear zone on collectors without curbs, low-speed rural collectors, and rural local roads.
- For local roads and streets, a minimum clear zone of 7 to 10 feet is considered desirable on sections without curb.
- As a practical matter, the clear zone dimensions may be limited by available right-of-way; the location, frequency, and nature of roadside objects; the presence of valued resources such as wetlands; or the need to provide for pedestrians.

Application of the Clear Zone

Placement of Utility Poles is Key

- Utility poles should not be installed within the clear zone.
- In suburban and rural environments, this means no closer than 7 feet.
- In urban environments, this means no closer than 4 feet.

Federal, State & Local Permitting Issues

Federal, State, and local laws modify the clear zone concept.

- National Electrical Safety Code is incorporated by reference into the Code of Federal Regulations (CFR)
- Since AASHTO is an industry standard and not a law, state and local regulations may govern.
- State and local regulations that apply to the installation of utilities impact the applicability of the clear zone concept.

Federal, State & Local Permitting Issues

National Electrical Safety Code.

- Part 2: Safety Rules for Overhead Lines; Part 231B: Clearances of supporting structures from streets, roads, and highways
 - Where there are curbs: supporting structures, support arms, anchor guys, or equipment attached thereto, up to 4.6 m (15 ft) above the road surface shall be located a sufficient distance from the street side of the curbs to avoid contact by ordinary vehicles using and located on the traveled way.
 - For a redirection curb, such distance shall be not less than 150 mm (6 in).
 - For paved or concrete swale-type curbs, facilities shall be located behind the curb.
- Where there are no curbs, supporting structures should be located a sufficient distance from the roadway to avoid contact by ordinary vehicles using and located on the traveled way.
- Location of overhead utility installations on roads, streets, or highways with narrow rights-of-way or closely abutting improvements are special cases that must be resolved in a manner consistent with the prevailing limitations and conditions.
- Where a government authority exercising jurisdiction over structure location has issued a permit for, or otherwise approved, specific locations for supporting structures, that permit or approval shall govern.

Standard of Care for Utility Pole Placement

Standard of Care for Utility Pole Placement

- How Does Comparative Liability Attach?
 - Standard of Care Defined
 - Applicable Standard of Care
 - Applying the Standard of Care to Your Claim

Standard of Care Defined

Legal Framework.

- Automobile accidents have been recognized by the courts as “frequent and inevitable contingency of normal automobile use.”
- Courts have recognized the distinction between the reason a vehicle departed from normal traffic movement and the reason damage was suffered in a subsequent collision:
 - “If a governmental body or private party creates a dangerous condition near a highway, the condition may be at least one cause of an injury”.
- Growing body of legal doctrine and policy guidance is aimed at reducing the impact of potential accidents through hazard avoidance and mitigation:
 - “The century-old common-law duty has been construed to require that the areas adjacent to the road ... be kept safe and free from hazards.” As such, “obstacles or devices capable of causing collisions resulting in injury or death should not be placed so close to a highway that a driver cannot stop before hitting them.”

Larsen v. General Motors Corporation, 391 F.2d 495, United States Court of Appeals 8th Circuit, March 11, 1968.
The Law and Roadside Hazards, Insurance Institute for Highway Safety, Michie Company

Standard of Care Defined

Legal Framework.

- Roadside hazards can be considered public nuisances and indicative of negligence.
- The government is “liable for public nuisances which endanger travelers” and has “a duty to maintain the roads in a safe condition, so as not to expose motorists to any undue hazards.”
- Negligence occurs when reasonable care has not been used to avoid an expected hazard. Actions are measured against a standard of care which “may be a written set of instructions, a policy, a guideline, or the accepted normal practice.”

The Law and Roadside Hazards, Insurance Institute for Highway Safety, Michie Company, 1974
Utilities and Roadside Safety, Transportation Research Board, National Academy of Sciences, 2004; Page 34

Applicable Standard of Care

What is the Standard of Care?

- AASHTO is the national body that develops the standards for normal practice in roadway design.
- AASHTO standards have been incorporated into design guidelines in most states and are referenced by the Federal Highway Administration as the guiding principles of roadway design.
- In determining reasonable care in avoidance of roadway hazards, AASHTO guidelines can be considered the standard of care.

Applying the Standard of Care to Your Claim

How do you know if a utility company has met the standard of care?

- Determine if the utility company has made every effort to conform to the standards in AASHTO, the National Electrical Safety Code, and state and local regulations.
- Would a reasonable prudent utility have placed their utility infrastructure in such a manner in light of these standards and regulations?

Identifying Opportunities to Subrogate

Identifying Opportunities to Subrogate

- What Does a Comparative Liability Claim Look Like?
 - Proximity to Traveled Way
 - Placement Contributing to Accident
 - Absence of Driver Impairment
 - Effects of Weather
 - Indications of Continued Poor Placement

Proximity to Traveled Way

What is too proximate?

- If the pole is within 7 feet of the edge of the traveled way in a rural or suburban setting, or 4 feet in an urban setting, it may be too close.
- Investigate more specific conditions in these cases.

Placement Contributing to Accident

Did the location contribute to the accident?

- If not, the pole may not be the proximate cause of the accident.
- Without the pole placement as a proximate cause, comparative liability may not attach.
- Fact sensitive investigation.

Absence of Driver Impairment

Was the driver impaired at the time of the accident?

- Many states carve out circumstances where the driver is impaired.
- Impairment can be a bar to a claim of comparative negligence.

Effects of Weather

What were the weather conditions at the time of the accident?

- Rain, sleet, snow, ice, and other weather conditions are precisely the reason why the clear zone doctrine exists.
- These conditions can bolster a case for comparative negligence.

Indications of Continued Poor Placement

Did the utility replace the damaged pole in exactly the same spot?

- Replacement of the pole in contravention of clear zone doctrine can be an indication of negligent conduct.
- Poles which have existed inside of the clear zone since before the clear zone doctrine may be excused.
- Ignoring the clear zone in the event of replacement, especially after a hit, can be evidence of negligence.

Examples in Practice

Examples in Practice

- Examples of Cases Where Comparative Fault Applied
 - Proximity to Traveled Way
 - Examples of Inapplicability

Proximity to Traveled Way

Nicks v. Teche Electric Co-Op, Inc., 93-1418 (La.App. 3 Cir. 1994), 640 So.2d 723.

Driver and passenger were injured when they were forced off the road by an oncoming motorist and their vehicle left the traveled way and struck a replacement utility pole lying in a grassy area just beyond the graveled shoulder of the roadway. They sued the utility company.

The Sixteenth Judicial Court, Parish of Iberia, entered judgment against the utility company, which appealed.

The Court of Appeal affirmed the decision and held that:

- Evidence supported determination that the utility company's utility pole located within 10 ft of the roadway was cause-in-fact of harm to the driver and passenger.
- The trial court did not err in imposing duty on the utility company to keep its equipment outside the clear recovery area.

Proximity to Traveled Way

McMillan v. Detroit Edison Company (426 Mich. 46, 393 N.W.2d 332).

A passenger in an automobile that left the traveled portion of a highway when struck by a hit-and-run driver and collided with a utility pole brought action against the owner of the pole and others. The utility pole was located in the grassy median, about 3 ft from the traveled portion of the highway.

The Oakland Circuit Court granted the utility's motion for summary judgment and the passenger appealed. The Court of Appeals affirmed.

The Supreme Court reversed lower court decisions and overruled some previous decisions by determining that placement of the poles could be so significant and important as to be regarded a proximate cause of the passenger's injury and that the utility could be found to owe a duty to motorists but that this determination should be made by a jury.

Examples of Inapplicability

Gouge v. Central Illinois Public Service Co., 144 Ill. 2d 535,544 (1991).

The Illinois Supreme Court held that:

- The electric utility owed no common law duty of reasonable care to ensure that if an automobile leaves the traveled portion of a roadway and strikes a utility pole, the pole will fall away from the roadway.
- Generally, the liability of a utility company for injuries to a motorist resulting from a collision with a utility pole depends on whether the pole is located in or so close to the traveled portion of the highway as to constitute an obstruction dangerous to anyone properly using the highway.
- Utility companies owe no duty to motorists who collide with utility poles unless it is reasonably foreseeable that the vehicles would leave the roadway in the ordinary course of travel and strike the utility poles.

Pole behind vertical curb



Pole behind vertical curb



Pole behind vertical curb



Pole behind vertical curb



Pole behind vertical curb



Pole behind vertical curb



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No curb or berm



No curb or berm



No curb or berm



No curb or berm



No curb or berm



No curb or berm



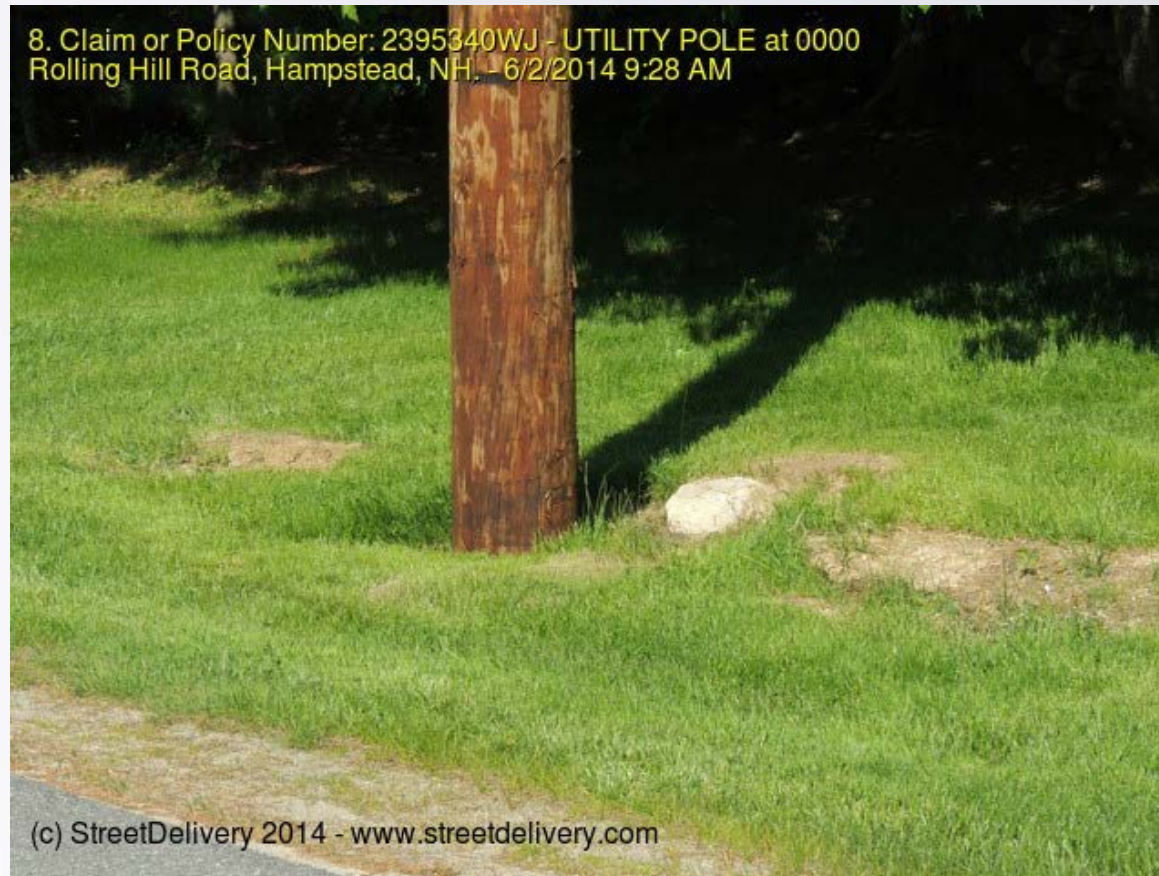
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13. Claim or Policy Number: 2395340WJ - UTILITY POLE MEASUREMENT
at 0000 Rolling Hill Road, Hampstead, NH. - 6/2/2014 9:28 AM



14. Claim or Policy Number: 2395340WJ - UTILITY POLE MEASUREMENT
at 0000 Rolling Hill Road, Hampstead, NH. BSE OF POLE IS 8 FEET
4 INCHES FROM STREET - 6/2/2014 9:29 AM

